

The Hungarian Constitutional Court and Constitutional Identity

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Ever since the 2010 parliamentary elections Hungary has set off on the journey to become an ‘illiberal’ member state of the EU, which does not comply with the shared values of rule of law and democracy, the ‘basic structure’ of Europe. The new government of Viktor Orbán from the very beginning has justified the non-compliance by referring to national sovereignty, (even using the absurd argument that “We won’t be a colony anymore”), and lately to the country’s constitutional identity guaranteed in Article 4 (2) TEU. This constitutional battle started with an [invalid anti-migrant referendum on 2 October 2016](#), was followed by the failed [Seventh Amendment to Fidesz’ 2011 Fundamental Law on 8 November 2016](#), and concluded in early December last year by a decision of the Constitutional Court, in which the packed body in a binding constitutional interpretation rubber-stamped the constitutional identity defense of the Orbán-government.

„With a Little Help from My Friends”

After the failed constitutional amendment the Constitutional Court, loyal to the government, came to rescue Orbán’s constitutional identity defense of its policies on migration, and everywhere where it may disagree with the EU. The Court carved out an abandonment petition of the also loyal Commissioner for Fundamental Rights, filed a year earlier, before the referendum was initiated. In his motion the ombudsman asked the Court to deliver an [abstract constitutional interpretation in connection with the European Council decision 2015/1601 of 22 September 2015](#). The Court in its decision 22/2016 (XII. 5.) AB – relying on the German Federal Constitutional Court’s methods of constitutional review of EU law – developed a fundamental rights review and an *ultra vires* review, the latter composed of a sovereignty review and an identity review.

The fundamental rights review is based on Article E) (2) and Article I (1) of the Fundamental Law. The latter provision declares that “The inviolable and inalienable fundamental rights of MAN shall be respected. It shall be the primary obligation of the State to protect these rights.” Having these rules in mind, and after referring to the *Solange* decisions of the German Federal Constitutional Court, and explicitly to ‘Solange III’ of 15 December 2015 (2 BvR 2735/14), and the need for cooperation in the EU and the primacy of EU law, the Court states that it cannot renounce the ultima ratio defense of human dignity and other fundamental rights. It further argues that as the state is bound by fundamental rights, this binding force of the rights are applicable also to cases when public power, under Article E), is exercised together with the EU institutions or other Member States.

Regarding the *ultra vires* review the Court argues that there are two main limits for the conferred or jointly exercised competencies, under Article E) (2): it cannot infringe the sovereignty of Hungary (sovereignty review) and its constitutional identity (identity review). The constitutional foundation of the sovereignty review is Article B) (1) of the Fundamental Law, which states that “Hungary shall be an independent, democratic rule-of-law State”. Paragraphs (3) and (4) contain the popular sovereignty principle: “(3) The source of public power shall be the people”, “(4) The power shall be exercised by the people through elected representatives or, in exceptional cases, directly”. The Court warns that “Article E) (2) should not empty Art B)” and it detects the “presumption of reserved sovereignty” in relation to judging the common exercise of other competences that have already been conferred to the EU.

The identity control, the Court argues, is based on Article 4 (2) TEU and on continuous cooperation, mutual respect, and equality. Even if it sounds tautological, according to the Court “constitutional identity equals with the constitutional (self-) identity of Hungary”. Its content is to be determined by the Constitutional Court on a case-by-case basis based on the Fundamental Law as a whole and its provision in accordance with Article R) (3), which states that “the provisions of the Fundamental Law shall be interpreted in accordance with their purposes, the National Avowal contained therein and the achievements of our historical constitution”. The Court holds that

the constitutional (self-)identity of Hungary does not mean a list of exhaustive enumeration of values, but the text mentions some of them: freedoms, the division of power, the republican form of state, respect of public law autonomies, freedom of religion, legality, parliamentarism, equality before the law, recognition of judicial power, protection of nationalities that are living with us. These are achievement of the Hungarian historical constitution on which the legal system rests.

The Court holds that the constitutional (self-)identity of Hungary is a fundamental value that has not been created but only recognized by the Fundamental Law and, therefore, it cannot be renounced by an international treaty. The defense of the constitutional (self-)identity of Hungary is the task of the Constitutional Court as long as Hungary has sovereignty. Because sovereignty and constitutional identity assort in many points, therefore the two reviews need to be employed considering one another.

Based on the above mentioned, the Hungarian judges ruled that the Court itself can examine whether the EU's exercise of power violates (a) human dignity or any other fundamental right, (b) Hungary's sovereignty, or (c) Hungary's constitutional identity rooted in its historical constitution, and based on this examination had the power to override EU law in the name of constitutional identity.

Viktor Orbán's first jubilant reaction has shown how enthusiastic he was that the Court has helped the government's ideals come true by making up for the failed referendum and the Seventh amendment: "I threw my hat in the air when the Constitutional Court ruled that the government has the right and obligation to stand up for Hungary's constitutional identity. This means that the cabinet cannot support a decision made in Brussels that violates Hungary's sovereignty", adding that the Court decision is good news for "all those who do not want to see the country occupied". In the same interview given to the Hungarian Public Radio Orbán pointed out the next subject of national constitutional identity, referring to the latest EU plan to terminate Hungarian state regulation of public utility prices. [He said](#) that European Commission is wrong in arguing that competition in the energy sector leads to lower prices. "Therefore Hungary insists on reducing utility rate cuts and we shall defend it in 2017. Although this will be a very tough battle, we have a chance of success".

What's Wrong with Hungary's New Constitutional Identity?

Both the mentioned Seventh Amendment to the Fundamental Law of Hungary and the described decision of the Constitutional Court on the interpretation of the country's constitutional identity seem to be carefully crafted documents to fit into the most refined European discourse about national constitutional identity. According to this discourse the concept of 'constitutional identity' in Article 4(2) TEU means that the Member States can define national identity, but the decision about the compatibility of the national identity with EU obligations since the Treaty of Lisbon is always vested in the European Court of Justice, which makes the ultimate decision. Ever since its seminal judgment in *Internationale Handelsgesellschaft* the ECJ confirms that national constitutional norms in conflict with secondary legislation should be inapplicable. But under the revised identity clause of Article 4 (2) TEU member state constitutions can specify matters of constitutional identity, and constitutional courts can apply identity control test to acts of the EU, and under certain limited circumstances are even permitted to invoke constitutional limits to the primacy of EU law. These constitutional limits are also embedded in the principle of sincere cooperation contained in Article 4 (3) TEU.

What's wrong then with the decision of the Hungarian Constitutional Court, which also wants to break with the absolute primacy?

First, it is important to clarify, under which of the possible scenarios of usage of constitutional identity the Hungarian decision falls. It is certainly not aiming at placing the legality of an EU legislative act under review. Although, as mentioned, the parliamentary commissioner in his petition to the Constitutional Court referred to the European Council decision 2015/1601 of 22 September 2015 on the quota system, but he did not ask the review of its legality, and the Court did not provide such review either.¹⁾Independently from this procedure, the Hungarian government, right after its Slovakian counterparts' submission also challenged the quota decision before the European Court of Justice. This procedure is still pending, but the ECJ in its decision won't take into account neither the text of the Hungarian constitution, nor the domestically binding interpretation of it by the Constitutional Court. Hence the decision can rather be considered as an attempt of derogation from Hungary's

obligation under EU law, claiming that transposing the quota system into national law conflicts with legitimate interests and principles which are deeply entrenched in the Hungarian national constitutional identity. As the ECJ has stressed in its standing jurisprudence public policy derogations have to be interpreted strictly so as to be applicable only when the case at hand entails a 'genuine and sufficiently serious threat to a fundamental interest of society'.²⁾Case C-208/09, Sayn-Wittgenstein, para 86. Of course, the compatibility of constitutionally entrenched values with EU law has to be ascertained by the ECJ on a case-by-case basis, but the Luxembourg Court made it also clear that member states have to exercise their competences in accordance with EU law.³⁾See for instance Case C-135/08, Janko Rottmann (2009) OJ C 113, 1.5.2010.

Although there is no strict and exhaustive list of constitutional identity-sensitive matters excepted by the ECJ, but taking into account the jurisprudence of the Court there are more frequently acknowledged issues, such as decisions on family law, the form of State, foreign and military policy, and protection of the national language.⁴⁾See these matters mentioned in P. Faraguna, 'Taking Constitutional Identities Away from the Courts', Brook. J. Int'l L. Vol. 41:2. 2016. 491, at 506-508. The subject matter of the Hungarian Constitutional Court decision was the quota decision of the European Council, based on which 1294 asylum seekers would be located from Greece and Italy to Hungary and the Hungarian authorities would be obliged to process their asylum application. What interests of the society can legitimately trump the international obligation here? The will of the government not to have any refugees,⁵⁾In May 2015, a few days after many hundreds of refugees have drowned in the Mediterranean Viktor Orbán announced that 'We need no refugees'. even if supported by 3.3 million voters during the invalid referendum, is certainly contradicts the requirement of sincere cooperation of Article 4(3) TEU.

And whose 'human dignity and other fundamental rights cannot be renounced' by the Court? The only rights, which need 'ultima ratio defense' here, are those of the migrants and refugees, but their rights will be ignored if Hungary exempts from the quota decision, and any other solution of the refugee and migrant crisis. In other words, the references to the Solange jurisprudence of the German Federal Constitution are misleading, because the German Court's invocation of constitutional identity aims at promoting higher standards that the EU law requires, while the Hungarian judges reference serves to lower the standards of fundamental rights protection.

Another problem with the Constitutional Court's interpretation is that it claims that 'Hungary's constitutional identity is rooted in its historical constitution'. But the substantive meaning of text of the Fundamental Law on 'the achievements of our historical constitution' is totally ambiguous;⁶⁾Some critics of the historical constitution even raise the possibility that the Court might consider the Hungarian Jewish laws, first of such acts in Europe outside of Germany, as part of it. there is no legal-scientific consensus in Hungary regarding their precise nature, and since the case law of the Constitutional Court prior to 2011 has been annulled, it is obvious that it should not be taken to include the precedents stemming from the Court's interpretation practice accumulated since the regime change. As opposed to the British tradition of unwritten constitution, in the thousand year of the Hungarian historical constitution – with the exception of some short moments, such as during the failed revolution of 1848 – the dominant approach was an authoritarian one.⁷⁾See I. Császár, B. Majtényi, 'Hungary: The Historic Constitution as the Place of Memory', M. Suksi, K. Agapiou-Josephides, J-P. Lehnars, M. Nowak (eds.) *First Fundamental Rights Documents in Europe*, Cambridge: Intersentia, 2015. 57-69.

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When the Hungarian Constitutional Court on behalf of the government protects Hungary's current constitutional identity, which is inconsistent with many of the joint values of Article 2 TEU, it promotes an unconstitutional national constitutional identity. If the EU will still be unable to protect its joint values towards member states, such as Hungary (and lately also Poland), which do not want to comply with them, the case of Hungary (and Poland) will have a negative impact on countries with genuine and legitimate national constitutional identity claims, and on constitutional pluralism in the EU.

References [+]

1. ↑ Independently from this procedure, the Hungarian government, right after its Slovakian counterparts' submission also challenged the quota decision before the European Court of Justice. This procedure is still pending, but the ECJ in its decision won't take into account neither the text of the Hungarian constitution, nor the domestically binding interpretation of it by the Constitutional Court.

 2. ↑ Case C-208/09, Sayn-Wittgenstein, para 86.

 3. ↑ See for instance Case C-135/08, Janko Rottmann (2009) OJ C 113, 1.5.2010.

 4. ↑ See these matters mentioned in P. Faraguna, 'Taking Constitutional Identities Away from the Courts', Brook. J. Int'l L. Vol. 41:2. 2016. 491, at 506-508.

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